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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1930

COLUMBUS & GREENVILLE RAILWAY COMPANY, ET AL.,

Appellants

V.

W. J. MILLER, STATE TAX COLLECTOR, FOR THE USE OF THE MISSISSIPPI LEVEE DISTRICT,

Appellee.

NO. 195

BRIEF FOR APPELLANT IN OPPOSITION TO APPELLEE'S MOTION TO AFFIRM.

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Attorneys for Appellants.

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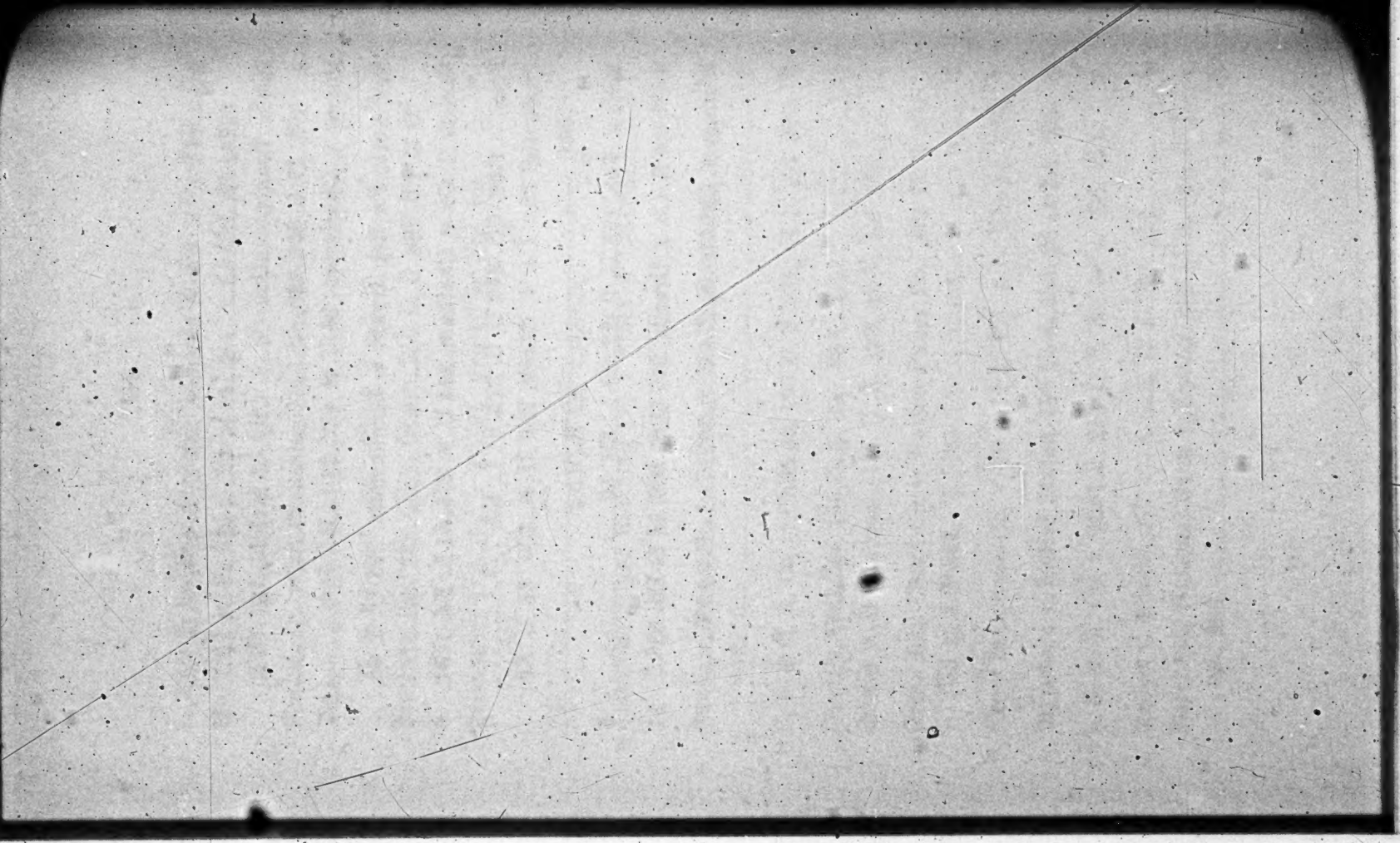

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V.

W. J. MILLER, STATE TAX COLLECTOR, FOR THE USE OF THE MISSISSIPPI LEVEE DISTRICT,

Appellee.

NO. 195

BRIEF FOR APPELLANT IN OPPOSITION TO APPELLEE'S MOTION TO AFFIRM.

The Appellee moves to dismiss the appeal and affirm the judgment of the Supreme Court of the State of Mississippi, appealed from in this case, on the ground that the appeal was prosecuted by Appellants by reason of the enforcement against them of Chapter 282, Mississippi Laws 1914; it being the position of Appellee's counsel that the judgment against the Appellants was rendered by the Supreme Court of the State of Mississippi under Chapter 259, Mississippi Laws 1926 and not Chapter 282, Mississippi

Laws 1914. Appellee's counsel take the position that the Supreme Court of the State of Mississippi did not hold the entire act of 1926 unconstitutional but merely held that the provision thereof, levying a privilege tax of fifty dollars ($50.00) per mile on railroads in the district, the mileage of which did not exceed twenty-five miles, was void and unconstitutional; and that therefore the remaining portion of the act of 1926 was left in full force and effect; and that the Appellants should have appealed from the enforcement of the act of 1926 and not the act of 1914.

A mere statement of the situation will disclose the weakness of Appellee's position. On July 1, 1928 the Appellee, State Tax Collector, for the use of the Mississippi Levee District, exhibited his declaration in the Circuit Court of Montgomery County, Mississippi. R. 1. The suit was not brought under the act of 1926 but was predicated under the act of 1914. The Plaintiff's declaration alleged that under the act of 1914 the Appellant Railway Company became liable to pay a privilege tax of three hundred and fifty dollars ($350.00) per mile. The declaration alleged that the Appellant Railway Company had paid taxes under Chapter 259, Mississippi Laws 1926; but that such act of 1926 was unconstitutional as violating Section 234 of the Constitution of the State of Mississippi, requiring the publication of bills before the legislature affecting the taxation or revenue of the Mississippi Levee District. Said Section 234, Article 11, Mississippi State Constitution of 1890, is set out in brief for respondent in this case, on page 32. It was the position of the Appellee and his declaration alleged that the act of 1926 was utterly void and therefore suit was predicat-

ed under Chapter 282, Mississippi Laws of 1914. The Plaintiff's declaration showing on its face that the Appellant Railway Company had discharged all liability imposed on it under Chapter 259 Mississippi Laws 1926, The Railway Company filed a demurrer to the Plaintiff's declaration claiming complete immunity under the act of 1926 and by reason of the fact that the Plaintiff's declaration by its averments disclosed that the Railway Company had made all the payments required of it under such act. The trial court sustained the demurrer of the Railway Company and dismissed the suit; and on appeal to the Supreme Court of the State of Mississippi the decision of the Circuit Court of Montgomery County, Mississippi, was reversed. The Supreme Court of the State of Mississippi using the following language: (154 Miss. 323.)

> "Chapter 259, Laws of 1926, divides railroads into two classes: First, railroads having not more than twenty-five miles of railroad in the levee district; and, second, all other railroads therein. The ground of the appellant's contention is that this classification has no reasonable relation to the purpose for which the statute was enacted, but is arbitrary and unreasonable, and therefore in violation of the due process and equal protection clauses of the Fourteenth Amendment to the Federal Constitution. This is so manifestly correct that the citation of authorities therefor would be supererogatory. It will not be necessary for us to decide whether this results simply in the proviso of chapter 259, Laws of 1926, being void, or in the whole statute being void, for in either event the tax which the appellee will have to pay will be the same; that is, three hundred fifty dollars per

annum on each mile of its railroad in the levee district."

The Supreme Court of the State of Mississippi did not say that the act of 1926 was valid as to any part; it did not say that the act was not totally void. In view of the fact that the Appellee was suing under the act of 1914, which was identical in terms and legal effect, it said that such question was not necessary to decision since the Plaintiff, Appellee, could recover under the provisions of the act of 1914. The case went back to the Circuit Court of Montgomery County for trial, the Appellee did not amend his declaration and sue under the Act of 1926 but tried the case under the allegations of the declaration predicating liability of the Railway Company under the act of 1914 on the theory that the act of 1926 was void. Recovery was had thereunder over the constitutional objection of the Appellants that the act of 1926 was a valid, legislative enactment, consistent with the fourteenth amendment to the Constitution of the United States; that to revive the act of 1914 and enforce it against the Railway Company in this case would deprive it of its property without due process of law; and that the act of 1914, if enforced against the Railway Company in this case, violated the fourteenth amendment to the Constitution of the Uunited States in that the Appellant Railway Company was deprived of its property without due process of law and denied the equal protection of the law. Recovery was had by the Appellee in the Circuit Court of Montgomery County, Mississippi, which recovery was affirmed by the Supreme Court of the State of Mississippi, 127 So. 784.

In other words, the Appellee predicated his right to recovery not under the act of 1926 but under the act of 1914 and recovery was had thereupon. Chapter 259, Laws of 1926, appeared in the case only defensive. The Appellant Railway Company claimed that the payments made thereunder constituted a complete defense to further liability on its part.

We respectfully submit that the Appellee cannot be heard in this Court or in any other court to say that Chapter 282, Mississippi Laws of 1914, was not enforced against the Appellant Railway Company in this case. Suppose that instead of prosecuting the appeal based upon the enforcement of the act of 1914 against it the Appellants had assigned as error the action of the court in enforcing the act of 1926. The Appellee would have replied thereto, with a motion to dismiss, that the suit was predicated under the act of 1914; that the liability of the Appellant in the declaration was alleged to be under the act of 1914 that recovery was had thereon and that no suit was ever brought by the Appellee under the act of 1926.

We respectfully submit that the Appellee, having invoked the act of 1914, and predicated the liability of the Appellant Railway Company thereunder, and having procured a judgment against the Appellant Railway Company under the allegations of its declaration, is now estopped to say that the act of 1914 is not involved in this case. The authorities are well settled that whenever a litigant successfully maintains a position before any tribunal, such litigant cannot thereafter controvert the correctness of the ruling invoked. *Davis vs. Wakelee*, 156 U. S. 680, 39 L. Ed. 578;

Robb vs. Vos, 155 U. S. 13, 39 L. Ed. 52; *Ingraham vs. United States*, 155 U. S. 434, 39 L. Ed. 213; *Merchants National Bank vs. Sexton*, 228 U. S. 634, 57 L. Ed. 998; *Norfolk Railway Co. vs. Chatham*, 244 U. S. 276, 61 L. Ed. 1131; *Pease vs. Engineering Co.*, 243 U. S. 273, 61 L. Ed. 715; *Banker Trust Co. vs. Raton*, 258 U. S. 328, 66 L. Ed. 642.

As a matter of fact, however, eliminating from the act of 1926 that portion thereof levying a tax of fifty dollars ($50.00) per mile on railroads having a mileage in the Levee District of not over twenty-five miles, the two acts are identical in language and legal effect. We attach as appendix to this brief each of the acts, underscoring the language of the act of 1926 found objectionable by the Supreme Court of Mississippi. The acts being identical in language and legal effect, and since the objection of the Appellants was predicated on the enforcement of an act imposing a privilege tax of three hundred and fifty dollars ($350.00) per mile against it, the question of the number of the act or date is not one of vital importance. It was the language and legal effect of the act which was complained of.

Appellee, however, is not in any position to say that it did not recover under the act of 1914 and therefore is not in a position to say that the act of 1914 was not involved in this case.

THE QUESTION PROPERLY PRESENTED

The Appellant Railway Campany in the Circuit Court of Montgomery County, Mississippi, seasonably interposed

objection to the act on account of the alleged unconstitutionality thereof. See R. 5-10. The constitutional objection was again presented in the Supreme Court of the State of Mississippi. Assignment of error, R. 47. The decision of the Supreme Court of the State of Mississippi was an affirmation of its previous decision, holding the act of 1926 unconstitutional and enforcing the act of 1914 over the objection of the Appellant Railway Company, in respect to its violating the fourteenth amendment to the Constitution of the United States in the particulars therein set out. It may therefore be assumed that the Appellant Railway Company properly raised the federal question relied on for a reversal in this case.

STATUTE NECESSARILY INVOLVED.

In order to confer jurisdiction upon this Court by appeal, it is only necessary that the question of the invalidity of the State Statute be raised in the State Court and either expressly decided or necessarily involved. If properly presented and necessarily involved it is immaterial that the State Court does not predicate its judgment upon that ground. *New York Ex Rel. Bryant vs. Zimmerman*, 278 U. S. 63, 73 L. Ed. 184; *Melton vs. O'Neal*, 275 U. S. 212, 72 L. Ed. 245; *Home Insurance Co. vs. Dix*, 74 L. Ed. Advance sheet 485; *Whitney vs. California*, 274 U. S. 357, 71 L. Ed. 1095; *Green Canal Co. vs. Patten Paper Company*, 172 U. S. 58, 43 L. Ed. 364; *Dewey ys. Des Moines*, 173 U. S. 193, 43 L. Ed. 665; *C. B. & Q. R. R. Co. vs. Chicago*, 166 U. S. 226, 41 L. Ed. 979; *Murray vs. Charleston*, 96 U. S. 432, 24 L. Ed. 760.

MOTION TO DISMISS ON THE MERITS

Appellee's counsel have not urged the Court to dismiss the appeal or affirm the case on the merits in the motion. Anticipating the possibility of the Court treating the motion filed as one to that end, we submit the following authorities upon that point.

In the case of *Mobile Transportation Company vs. City of Mobile*, 187 U. S. 479, 47 L. Ed. 266, this Court held that a motion to dismiss and affirm will not be sustained unless the federal questions involved are frivolous and undeserving of notice.

In the case of *L. & N. R. R. Co. vs. Melton*, 218 U. S. 36, 54 L. Ed. 921, it is held that a motion to dismiss and affirm will not be sustained on the ground that the question has been foreclosed where analysis and exposition are necessary in order to make clear the decisive effect of such prior decision, upon the issue presented.

In the case of *Mo. Pac. R. R. Co. vs. Larabee*, 234 U. S. 459, 58 L. Ed. 1398, it is held that a motion to dismiss and affirm will not be sustained where the federal question presented is not obviously frivolous.

1. *Federal Question Presented not Devoid of Merit.*

The position of the appellants in this case is not inconsistent, as stated by appellee's counsel. The position of appellants has always been, and is now, that the Act of 1926 is and was a valid legislative enactment under the Four-

tenth Amendment to the Constitution of the United States; that wide latitude is allowed a state legislature in classifying property for taxation; that the legislature of a state may even exempt from taxation altogether certain classes of property. *American Sugar Refining Co. vs. State of Louisiana*, 179 U. S. 89, 45 L. Ed. 102.

Aside from the question, however, as to whether under all circumstances a mileage classification for taxation of railroads is valid, the dissimilarity in (a) value; (b) earning power; (c) exposure to hazard from the flood waters of the Mississippi River; (d) location, construction, etc., between the Columbus & Greenville Railway and any other main line standard gauge railroad in the district, justified the classification. To that position the appellants have consistently adhered, and still urge upon the Court.

However, when the Supreme Court of the State of Mississippi held that the Act of 1926 was invalid, and that the Act of 1914 was enforceable against it, with perfect consistency the appellant took the position that owing to the dissimilarity in conditions existing in the levee district as to the Yazoo & Mississippi Valley Railroad Company and the Columbus & Greenville Railway Company, the only two standard gauge main lines in the district, and owing to the fact that the Columbus & Greenville Railway was rated as a third class railroad and the Yazoo & Mississippi Valley Railroad as a first class railroad, the Yazoo & Mississippi Valley Railroad Company's property was assessed for thirty-two times per mile as much as that of the appellant railway company, that a mere mileage classification was arbitrary and void, and that the tax was further discriminatory

in that no fair opportunity for doing justice was presented, because the Columbus & Greenville Railway Company was not in position to have and receive benefits accruing to it from the construction and maintenance of levees as would be enjoyed by the Yazoo & Mississippi Valley Railroad Company's standard main line. In other words, that the conditions as to these two standard main lines were so dissimilar that the placing of the same tax per mile upon the Columbus & Greenville Railway as was placed upon the Yazoo & Mississippi Valley Railroad was arbitrary, unjust and discriminatory. See authorities Statement of Jurisdiction page 13.

In passing upon the Act of 1926, the Supreme Court of the State of Mississippi said that a mileage classification was invalid under the Fourteenth Amendment to the Constitution of the United States without regard to the dissimilarity existing as to a road operating not exceeding twenty-five miles in the district. However, when we come to the Act of 1914, the Supreme Court of the State of Mississippi holds that the classification of standard gauge main lines for taxation upon a mileage basis is valid under the Fourteenth Amendment to the Constitution of the United States, regardless of the dissimilarity in conditions and benefits to be received. It is perfectly apparent that the inconsistency is in the rule announced by the Supreme Court of the State of Mississippi in the case. It can not be right twice. The classification of a standard gauge main line on a mileage basis can not be void as violating the Fourteenth Amendment in one instance and be good in the next instance regardless of the dissimilarity in conditions.

The appellants in this case do not stand merely upon the question of classification upon a mileage basis, but show in connection with the mileage dissimilar conditions which not only jutify but require different legislative classification. In other words, the Columbus & Greenville Railway Company, the appellant, owing to the many dissimilar conditions between it and the only other standard gauge main line in the district required a separate and different classification. *Southern Ry. Co. v. Green,* 216 U. S. 400, 54 L. Ed. 536.

This Court, of course, may determine on appeal questions which otherwise would be reviewable by certiorari, where a substantial federal question is presented justifying an appeal. *Prudential Insurance Co. vs. Cheek,* 259 U. S. 530, 66 L. Ed. 1044.

We respectfully submit that appellee's motion to affirm should be over-ruled, jurisdiction on appeal sustained, and appellant's petition for writ of certiorari granted.

Respectfully submitted,

Wm. H. WATKINS,
A. F. GARDNER, Sr.
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A. F. GARDNER, Jr.,
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Attorneys for Appellants.

APPENDIX.

CHAPTER 282

House Bill No. 179.

AN ACT to amend chapter 125 of the acts of 1908, entitled "An act to amend chapter 7 of the acts of 1886, entitled an act to provide for the payment of levee taxes by railroads in the Mississippi levee district of the State, approved March 5, 1908.

Mississippi levee district; railroad taxes; act 1908 *amended.*

Section 1. Be it enacted by the Legislature of the State of Mississippi, That chapter one hundred and twenty-five of the acts of 1908 be and the same is hereby amended so as to read as follows:

That chapter 7 of the acts of 1886 be and the same is hereby amended so as to read as follows:

That for the purpose of contributing to the expense of building, maintaining and repairing levees in the Mississippi levee district, and of paying the debts and liabilities incurred therefor, by the board of Mississippi levee commissioners, the following tax is hereby levied and assessed upon all railroads and parts of railroads lying and situated in the said levee district, to-wit: Upon each and every mile of the main or trunk line of all broad or standard gauge railroads, not including side tracks or switches, the sum of $350.00 per annum; upon each and every mile of narrow gauge railroad or railroads of less width than standard gauge, not including side tracks or switches, the sum of $87.50 per annum; and upon each and every mile of broad or standard

gauge railroads, not used and operated as a main or trunk line, but constituting and used as a feeder to a branch of a main or trunk line, or to connect such main or trunk line, with some other system, the sum of $210.00 per annum; provided, that no railroad or branch railroad shall be subject to taxation under this act while the same is in process of construction, but if any part thereof shall be used for profit, that part so used shall be taxed, although the whole of said railroad or branch may not be finished.

Taxes to be paid over by railroad treasurer of levee board.

Sec. 2. That said taxes shall be paid by the person or corporation owning or operating said railroads to the treasurer of said Mississippi levee district on or before the first day of November in each year; but upon roads hereafter constructed such a tax be payable in one year, only upon so much of said railroads as shall have been used for profit prior to the first day of February in that year.

If taxes not paid when due, ten per cent damages to accrue.

Sec. 3. That if said tax is not paid when due, then ten per cent damages shall accrue thereon, and upon affidavit filed with the circuit court clerk of Washington county, by the treasurer of the board of Mississippi levee commissioners, stating the amount of tax due and unpaid and the railroad in default, said clerk shall issue a writ to the sheriff of Washington county of the sheriff of such other county in said levee district as may be necessary, stating in such writ the amount of tax due of and the damages thereon, and directing said sheriff to sell so much of said railroad as may be in his county, in the same manner, at the same place,

and upon the same notice and terms as is prescribed by law for sale of real estate under execution, for the tax and costs due on said railroad, and said sheriff shall forthwith pay over the amount so collected to the treasurer of said levee board, and shall execute a deed to the purchaser and at once place him in possession of said railroad.

When board reduces other taxes, proportionate reduction to be made in these taxes.

Sec. 4. That whenever, under the power conferred by law upon said board of levee commissioners, any reduction is made in their other taxes, then said board shall make a proportional reduction in the taxes assessed by this act for that year, and shall notify the railroad company or other person operating said railroad of such reduction.

Sec. 5. That this act take effect and be in force from and after its passage.

Approved February 28, 1914.

CHAPTER 259

SENATE BILL NO. 137.

AN ACT to amend section 1, chapter 282, laws of Mississippi, 1914, so as to reduce the tax on certain lines of railroad in the Mississippi levee district.

Mississippi levee district tax on certain lines of railroads reduced.

Section 1. Be it enacted by the Legislature of the State of Mississippi, That section 1, of chapter 282, laws of Missis-

sippi 1914, be, and the same is hereby amended so as to read as follows:

That for the purpose of contributing to the expense of building, maintaining and repairing levees in the Mississippi levee district, and of paying the debts and liabilities incurred thereof, by the board of Mississippi levee commissioners, the following tax is hereby levied and assessed upon all railroads and parts of railroads lying and situated in the said levee district, to-wit: Upon each and every mile of the main or trunk line of all broad or standard gauge railroads, not including side tracks or switches, the sum of $350.00 per annum; upon each and every mile of narrow gauge railroad or railroads of less width than standard gauge, not including side tracks, or switches, the sum of $87.50 per annum; and upon each and every mile of broad or standard gauge railroads, not used and operated as a main or trunk line, but constituting and used as a feeder to or a branch of a main or trunk line, or to connect such main or trunk line with some other system, the sum of $210.00 per annum; provided, that no railroad or branch railroad shall be subject to taxation, under this act while the same is in process of construction, but if any part hereof shall be used for profit, that part so used shall be taxed, although the whole of said railroad or branch may not be finished; *provided further that the tax per mile per annum on the main line of any railroad company which does not own in excess of twenty-five miles of railroad in the Mississippi levee district shall be* $50.00 *per annum.*

Sec. 2. That this act shall take effect and be in force from and after its passage.

Approved March 2, 1926.